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In The

# Supreme Court of the United States

October Term, 1969

## No. 1545

**FRANK J. PATE, Warden of the Illinois State Penitentiary,**

*Petitioner,*

vs.

**HONORABLE JOSEPH SAM PERRY,**
**United States District Judge,**

*Respondent.*

## ANSWER TO PETITION FOR WRIT OF CERTIORARI

## STATUTORY PROVISIONS.

**28 USC, Section 2244(a):**

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

**28 USC, U. S. Sup. Ct. Rule 19(1)b:**

Considerations Governing Review On Certiorari

"Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

## ARGUMENT.

**The writ of mandamus is an extraordinary remedy which the petitioner here seeks to abuse by using it as a means for obtaining an interlocutory appeal of a non-appealable order of the district court judge denying petitioner's motion to dismiss the amended petition for habeas corpus.**

The Court of Appeals for the Seventh Circuit denied the petition for a writ of prohibition and/or mandamus to issue since it failed to show exceptional circumstances to warrant issuance of the writ. The petition lacked a showing of a clear and indisputable right to the relief. In *Will* v. *United States,* 389 U.S. 90, 95-96, 88 S. Ct. 269, 273-274 (1967), this Court stated:

> "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.,* 319 U.S. 21, 26, 63 S. Ct. 938, 941 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy. *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U.S. 212, 217, 65 S. Ct. 1130, 1132, 89 L. Ed. 1566 (1945). . . .
>
> "We also approach this case with an awareness of additional considerations which flow from the fact that the underlying proceeding is a criminal prosecution. All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances,

> until after final judgment has been rendered by the trial court. This general policy against piecemeal appeals takes on added weight in criminal cases, where the defendant is entitled to a speedy resolution of the charges against him." (citations omitted).

Also see *Bankers Life and Casualty Co.* v. *Holland,* 346 U.S. 379, 383-384, 74 S. Ct. 145, 148 (1953).

The district court below has not usurped any power in denying petitioner's motion to dismiss Townsend's petition for habeas corpus as recognized by the Court of Appeals. On the contrary the district court acted in full compliance with its duties, authority and obligations under Section 2244(a) of Chapter 28 of the United States Code. There the ultimate standard for determining whether to entertain an application for a writ of habeas corpus, where there has been a determination of a prior writ of habeas corpus (a situation not covered in Section 2254 cited by petitioner), is "the judge or court is satisfied that the ends of justice will not be served by such inquiry."

The district court below, by its denial of petitioner's motion to dismiss, found the ends of justice would be served by entertaining Townsend's amended successive petition for habeas corpus. This Court in *Sanders* v. *United States,* 373 U.S. 1, 15, 16, 83 S. Ct. 1068, 1077, 1078 (1963) fully examined the discretion of the district court when dealing with a successive application for habeas corpus, and stated on page 1079:

> "The principles governing both justifications for denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collat-

eral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits. Cf. *Townsend* v. *Sain, supra,* 372 U.S., at 312, 318, 83 S. Ct. 293. We are confident that this power will be soundly applied."

The question before the district court below was not whether state remedies were exhausted, for this was not the applicant's first habeas corpus petition, but rather a successive application governed by the standards in Section 2244 and set out in the *Sanders* case. The district court did not abuse its discretion in ordering a psychiatric examination where the need resulted from a change in Townsend's condition subsequent to the filing of the first petition. Nor is there an abuse of discretion in litigating the question of the voluntariness of the confession in light of subsequent changes in the law (*Miller* v. *Pate*, 386 U.S. 1, 87 S. Ct. 785 (1967)). With respect to the question of the right to counsel there have been advances and changes in the law to protect this right besides *Escobedo* and *Miranda,* cited by petitioner on page 18 of his petition.

The petition for certiorari herein does not show that the Court of Appeals in denying the petition for a writ of mandamus sanctioned any departure from the accepted and usual course of proceedings which would warrant this Court issuing a writ of certiorari under any of the grounds set out in Rule 19(1)b of the Rules of the Supreme Court of the United States. Rather the Court of Appeals did not find the exceptional circumstances or clear and indisputable right to the writ of mandamus, because the district court judge's denial of the motion to

dismiss was a proper exercise of his discretion, not an usurpation of power. Thus petitioner's attempt to obtain a review of the merits of the case without proceeding according to the authorized appellate procedures, was properly thwarted.

## CONCLUSION.

Respondent requests that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

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